88-1114

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MARVIN and GERALD LEBMAN, Individually
and as Class Representatives of 3,596
FORMER SHAREHOLDERS OF NATIONAL UNION
ELECTRIC CORPORATION

Petitioners

v.

AKTIEBOLAGET ELECTROLUX,
a Swedish Corporation
DOMETIC INCORPORATED,
a Delaware Corporation
NATIONAL UNION ELECTRIC CORPORATION,
a Delaware Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1988. Rehearing en banc was denied on August 30, 1988.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the dismissal without notice to the absent class members of a nationwide class action which was certified under Rule 23 (b) (3) Fed. R. Civ. Pro. violated the Due Process Clause of the Fifth Amendment and Rule 23 (c) (2) of the Federal Rules of Civil Procedure? If so, was the judgment of dismissal void as a matter of law?

2. How should the courts choose limitations periods for implied causes of action for sections 10 (b) and 14 (e) of the Securities and Exchange Act. of 1934?

(a) Should the courts continue to use the most appropriate limitations period of the forum state or should a limitations period be derived elsewhere from federal law?

(b) If the forum state's limitation period is used, What is the most appropriate limitations period? Should the courts use the state limitations period applicable to "Blue-sky" statutes or common law fraud actions? In this case, is the use of the limitations period of the state Securities Act more appropriate that the period applicable for a common law fraud action?

(c) If a limitations period is derived elsewhere from federal law, from whence should it come? Should it be based upon a conflict of law rule based upon federal common law? Should it be derived from the express limitations periods of the other

sections of the 1934 Act?

(d) If the appropriate limitations period is derived from the express limitations periods of the 1934 Act, when does it start to run? Who has the burden of proving when it started to run? What is the proper standard of knowledge, actual or constructive, used to determine when the statute begins to run?

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Fifth Circuit were:
Marvin and Gerald Lebman
Appellants, Plaintiffs in the District
Court and Petitioners in this Petition,

3,596 Former Shareholders of
National Union Electric Corporation
as a class forced out pursuant
to a Merger on August 1, 1975 ("The Class")
Appellants, Plaintiffs (absent) in the
District Court and Petitioners herein,

Aktiebolaget Electrolux, a Swedish Corporation
Dometic, Inc., a Delaware Corporation
National Union Electric Corporation, a Delaware
Corporation,
Appellees and Defendants in the District Court.

LISTING UNDER SUPREME COURT RULE 28.01

Set forth below is a listing of the parent companies, subsidiaries and affiliates of the Respondents. On about 1987, Aktiebolaget Electrolux became the Electrolux Group of Companies and is set forth in the following divisions and subsidiaries:

* ELECTROLUX GROUP (AB) (FORMERLY AKTIEBOLAGET ELECTROLUX)
HUSQVARA SEWING MACHINE (subsidiary)
The Eureka Company (division)
The Kent Company (subsidiary)
* WHITE CONSOLIDATED INDUSTRIES, INC. (subsidiary)
Anaheim Mfg. Co. (division WCI)
Atherns Stove Works (division WCI)
Gerard Metal Craftsmen (division WCI)
KCP Co. (division WCI)
Richards - Wilcox (division WCI)
WCI Canada Limited (division WCI)
WCI Machine Tools & Systems (division WCI)
* NATIONAL UNION ELECTRIC CORPORATION (subsidiary)

(In 1987, Dometic, Incorporated was merged into White Consolidated Industries)

(*asterisk used to designate party litigants)

TABLE OF CONTENTS

Page

Questions Presented For Review i

List Of All Parties iii

Listing Under Supreme Court Rule 28.1 iv

Table of Contents v

Table Of Authorities vii

Opinions Below x

Statement Of Jurisdiction x

Constitutional Provisions Involved x

Statutes Involved x

Statement Of The Case 1

Reasons For Allowing Writ 3

I. Conflict, Confusion And Uncertainty Exist Among The Circuit Courts Over How To Choose Limitations Periods For Implied Causes Of Action Under The Federal Securities Laws 3

II. The Fifth Circuit Decision Is In Conflict With The Other Circuits And This Court's Decisions In *Wilson v. Garcia* And *Agency Holding Corporation v. Malley-Duff Assoc., Inc.* As To The Determination Of The Applicable Statute Of Limitations Period For Implied Causes Of Action Under The Federal Securities Laws 4

Page

III. The Circuit Courts Are In Conflict Over When The Limitations Period Begins To Run In Implied Actions Under The Federal Securities Laws 8

IV The Fifth Circuit's Refusal To Vacate The District Court's Judgement Of Dismissal Conflicts With The Seventh Circuit And *Eisen v. Carlisle & Jacquelin* With Respect To The Rights Of The Absent Class Members, Pursuant To Rule 23 (c) (2) Fed. Civ. Pro. And Fifth Amendment Due Process 9

Conclusion 13

Appendix 1a

APPENDIX

A. Opinion of The United States Court of Appeals for The Fifth Circuit 1a

B. Order of The United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Suggestion for Rehearing *En Banc.* 11a

C. Order of The United States District Court for The Western District of Texas 12a

D. Judgment of the United States District Court for The Western District of Texas 17a

E. Constitutional Provision Relevant to the Case 18a

F. Statutes Involved in The Case 18a

TABLE OF AUTHORITIES

I. CASES **Page**

Agency Holding Corp v. Malley-Duff and Assoc., Inc
_____ U.S. _____, 107 S.Ct. 2759 (1987) ...2,6,7,8

American Pipe & Construction v. Utah,
414 U.S. 538 (1974) 10

Carothers v. Rice, 633 F. 2d 7 (6th Cir. 1980) 6

Dupuy v. Dupuy, 551 F. 2d 1005 (5th Cir. 1977) 6

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 10

Ernst & Ernst v. Hochfelder ,
425 U.S. 185 (1976) 3

Friedlander v. Troutman, Sanders and Lockerman,
788 F. 2d 1500 (11th Cir.1986) 6

Gert v. Elgin National Industries, Inc., 773 F. 2d 154
(7th Cir. 1985) 12

Hansberry v. Lee, 311 U.S.32 (1940) 11

Herman v. MacLean V. Huddleston, U.S. 375 (1983) 7

In Re Data Access Systems Securities Litigation
843 F. 2d 1537 (3rd Cir. 1988) 4, 8

Morris v. Stifel, Nicolas & Co., 600 F. 2d 139
(8th Cir. 1979) 6

Page

Mullane v. Cental Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 11

O'Hara v. Kovens, 625 F. 2d 15 (4th Cir. 1980) 6

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 11

Roberts v. Magnetic Metals Co., 611 F. 2d 450
(3rd Cir. 1979) 6

SEC v. Capital Gains Research,
375 U.S. 180 (1963) 7

Suslick v. Rothschild Sec. Corp., 741 F. 2d 1000
(7th Cir. 1984) 8

West v. Capitol Federal Savings and Loan Assn.,
558 F. 2d 977 (10th Cir. 1977) 12

White v. Sanders, 650 F. 2d 627 (5th Cir. 1981) 6

Wilson v. Garcia, 471 U.S. 261 (1985) 2, 3, 6, 7

Wood v. Combustion Engineering
643 F. 2d 339 (5th Cir. 1981) 2, 5, 7

II. Constitutional Provisions

U.S. Const. Amendment V 9, 11

III. Statutes Page

15 U.S.C. 78 j (b) 3

15 U.S.C. 78 n (e) 3

15 U.S.C. 78 r (c) 9

Rule 23 Fed Civ. Pro. 11, 12

Rule 23 (b) (3) Fed. Civ. Pro. 9, 11

Rule 23 (c) (2) Fed. Civ. Pro. 9, 10, 11, 12

Tex. Rev. Civ. Stat. Ann. art. 581-33 (Vernon 1985) 5

Tex. Rev. Civ. Stat. Ann. art. 5226 (Vernon 1985) 5

Tex.Bus. & Comm. Code. Sec. 27.01 (Vernon 1987) 5

Tex. Civ. Prac. & Rem. Code Sec 16.003 (Vernon 1987) 5

IV. Miscellaneous

Advisory Committee's Note to Rule 23,
39 FRD 69 (1962) 10

Congressional Record - Senate, pp. 149-200
(May 7, 1934) 9

Report of the Task Force on Statute of Limitations,
(ABA Committee on Federal Regulation of
Securities) 41 Bus. Law. 645 (1986) 3, 4, 9

Wright & Miller, *Federal Practice & Procedure*.
Sec 1786 (1985) 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in Appendix A hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 4, 1988. Petitioners' timely application for rehearing was denied on August 30, 1988, and this petition for Certiorari was filed within 90 days of the date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution is set forth in full text in Appendix E.U.S. Constitution Amendment V.

STATUTES INVOLVED

The sections of Texas limitations statutes which this case involves are:

Tex Rev. Civ. Stat. Ann art 5526 (Vernon 1985)

Tex. Rev. Civ. Stat. Ann art 581-33 (Vernon 1988)

Tex. Bus & Comm. Code 27.01. (Vernon 1987)

Tex. CIV. Prac. & Rem. Code 16.003 (Vernon 1985)

See Appendix F. for full text.

STATEMENT OF THE CASE

Marvin and Gerald Lebman, Petitioners, were stockholders in National Union Electric Corporation ("National Union"). On June 20, 1974, Respondent AKTIEBOLAGET ELECTROLUX, ("ELECTROLUX") A Swedish corporation, mailed an offer to purchase all outstanding shares of National Union common stock, at $28 per share to all stockholders. Through this offer, Electrolux acquired approximately ninety-two percent of National Union's outstanding shares, however, a total of 3,596 shareholders, including the Lebmans, chose not to accept. On August 1, 1975, National Union was merged with a wholly-owned Electrolux subsidiary, NUE. INC. pursuant to Delaware Corporation law. On or about August 5, 1975 a notice of merger was mailed to all remaining shareholders including Petitioners describing the merger, offering $28 per share or explaining the alternative remedy of appraisal of the shares pursuant to Delaware law. Most of the minority shareholders accepted the $28 per share offer; the Lebmans and five other shareholders elected to seek an appraisal in the Delaware Chancery Court. During the course of the appraisal proceedings, the Lebmans were allowed some limited discovery. Based upon that discovery and some independent investigation, on July 28, 1978, within three (3) years after the merger, the Lebmans filed suit in the United States District Court for the Western District of Texas under the federal securities laws and related state law claims including sections 10 (b) and 14 (e) of the Securities Exchange Act of 1934. 15 USC. Sec. 78; (b) and 78 n (e). The essence of the claims is (1) that at the time of the tender offer Electrolux fraudulently omitted its intent to merge with National Union; and, (2) that they intentionally undervalued the shares of National Union during the merger.

On November 20, 1984, after a six year delay caused by an extensive contest over personal jurisdiction of the Respondents,

the district court certified as a class, those 3,596 former National Union shareholders who refused to tender their shares pursuant to the Electrolux offer to purchase. See Appendix "C". It is undisputed that notice was never sent to the absent class members. Initially, there was extensive litigation over the form of notice to the class. The class notice was never approved by the district court and hence never sent despite the Lebmans' efforts (which included several vigorously opposed motions for approval of class notice filed through April 29, 1987).

On August 31, 1987, the district court granted Respondents' motion to dismiss in its entirety, holding that all complaints were time-barred. The basis of this holding was the Fifth Circuit's previous decision in *WOOD V. COMBUSTION ENGINEERING*, 643 F.2d 339 (5th Cir. 1981) which held that the Texas two-year limitations statute governed implied federal causes of action under the federal securities laws.

On appeal, the Lebmans urged that the Fifth Circuit reconsider its prior decision in *WOOD V. COMBUSTION ENGINEERING*, supra. in light of the Supreme Court's subsequent decisions in *WILSON V. GARCIA* 471 U.S. 261 (1985) and *AGENCY HOLDING CORP. V. MALLEY DUFF. and ASSOCIATES, INC.*, _____U.S. _____, 107 S. Ct. 2759, (1987). The Lebmans also urged by way of supplemental brief that the district court erred in dismissing this class action without notice to the absent class members.

On August 4, 1988, the Fifth Court of Appeals affirmed the judgment of the district court. The court held that neither *Wilson*, supra. or *Agency Holding*, supra. would change the result in the case. Further, the court noted that the class was certified, but dismissed before notice was given to the absent class members; however, it merely held that the dismissal had "no affect on the rights of those unnotified class members."

Because it determined that the two-year limitations statute applied to all of the Lebmans claims, the Fifth Circuit did not

reach the remaining issues on appeal.

Timely petition for rehearing *en banc* was filed by the Petitioners. This was denied on August 30, 1988.

REASONS FOR ALLOWING THE WRIT

I. CONFLICT, CONFUSION AND UNCERTAINTY EXIST AMONG THE CIRCUIT COURTS OVER HOW TO CHOOSE LIMITATIONS PERIODS FOR IMPLIED CAUSES OF ACTION UNDER THE FEDERAL SECURITIES LAWS.

Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 do not contain a limitation statute. See 15 U.S.C. Sections 78j (b); 78 n (e). When a federal statute does not contain a statute of limitations period, the general rule is that the courts adopt the most appropriate, analogous state limitations periods. *Wilson v. Garcia*, 471 U.S. 261 (1985).

Because Congress did not expressly create a private cause of action under section 10(b) and 14(e), of the 1934 Act, it did not specify a limitations period for those actions. Courts have adopted the widely held practice of borrowing the most appropriate state limitations period of the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. 29 (1976).

However, this practice has resulted in myraid inconsistent federal court decisions. It is uncertain what statute of limitations is applicable in several federal circuits which can range from as short a period as one year in Maryland to ten years in Tennessee. See *Report of the Task Force on Statute of Limitations for Implied Actions* (ABA Committee on Federal Regulation of Securities) 41 Bus. Law. 645 (1986) (hereinafter ABA Report).

The Third Circuit Court of Appeals recently took the unprecedented step of adopting the limitation period for express causes of action under the Securities Exchange Act of 1934. See

In Re Data Access Systems Securities Litigation, 843 F.2d 1537 (3rd Cir. 1988). The step taken by the Third Circuit was expressly rejected by the Fifth Circuit in the instant case: "Federal statues of limitation are therefore applied only when 'it may be appropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.'". (Fifth Circuit opinion, page 6). The Third Circuit's decision to adopt the 1934 Act express limitations periods adds more confusion and uncertainty to this conflict. As noted, the federal circuit courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field. See *In Re Data Access*, supra, 843 F.2d at 1540; ABA Report at 646-647, and 656-657.

This writer cannot re-duplicate the extensive and well reasoned analysis of Judge Aldisert in *In Re Data Access*, supra. and the thorough and well-researched evaluation made by the ABA Committee's Task Force on statute of limitations for implied actions (contained in the 41st volume of the ABA publication of *Business Lawyer*, 1986). Many of the cases which demonstrate the confusion which exists over how to select a statute of limitations for federal securities caes are collected in this ABA report. This writer can only urge that this Court review this important issue based upon the conclusion reached by the Third Circuit in *In Re Data Access* and the ABA report. These authorities contain an extensive survey by state and by circuit of the applicable limitations periods for 10b-5 actions. They illustrate and bolster this writer's conclusion that conflict, confusion, and uncertainly exist among the circuit courts over how to choose limitations periods for implied causes of action under the Federal securities laws.

II. THE FIFTH CIRCUIT DECISION IS IN CONFLICT WITH THE OTHER CIRCUITS AND THIS

COURT'S DECISIONS IN *WILSON V. GARCIA AND AGENCY HOLDING CORPORATION V. MALLEY-DUFF ASSOCIATES, INC.* AS TO THE DETERMINATION OF THE APPLICABLE STATUE OF LIMITATIONS PERIOD FOR IMPLIED CAUSES OF ACTION UNDER THE FEDERAL SECURITIES LAWS.

The Fifth Circuit rested upon the basis of its prior decision in *Wood v. Combustion Engineering*, supra., 643 F. 2d at 339. In *Wood*, the Fifth Circuit examined two Texas statutes that created causes of action resembling a 10b-5 claim: the Texas statute on fraud in real estate and stock transactions, Tex. Bus. & Com. Code. Ann. Sec. 27.01 (the "fraud statute") and Tex. Rev. Civ. Stat. Art. 581-33 (the "Blue Sky law"). The fraud statute (sec. 27.01) does not contain a time limit within which suit must be brough, but the two year period of Tex. Rev. Civ. Stat. Art. 5526 (Vernon 1985) (now codified in revised form at Tex. Civ. Prac. & Rem Code Ann. 16.003) is applied to actions based on fraud. The Blue Sky law expressly provides that an aggrieved buyer (or seller) of securities generally must sue within three years after the discovery of the untruth of omission of a material fact or within five years after the sale (or purchase).

In *Wood*, the Fifth Circuit further examined the elements of the fraud statute and the elements of the Blue Sky law and compared each to the elements of 10b-5. The court stated that two major considerations, which go to the very heart of the substantive causes of action convinced the court that the Blue Sky law was broader that the fraud statute of 10b-5, *Wood*, supra at 345. Reliance and scienter were found to be elements of the fraud statue and 10b-5, but not the Blue Sky law. Based upon this analysis, the court held that the two year limitations statute applies to any 10b-5 actions in Texas. 643 F.2d at 345. The Fifth Circuit in the instant case merely reaffirmed its earlier holding in *Wood*, supra.

However, this particular approcach has been rejected by

other circuits see e.g. *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980), *Carothers v. Rice*, 633 F.2d 7, 13-14 (6th Cir. 1980); *Morris v. Stifel, Nicolas & Co.*, 600 F.2d 139, 143 (8th Cir. 1979); *Friedlander v. Troutman, Sanders and Lockerman*, 788 F.2d 1500, 1507 (11th Cir. 1986). It should be noted that the Fifth Circuit itself has rejected this particular approach to 10b-5 actions in Alabama and Louisiana. See *White v. Sanders*, 650 F.2d 627 (5th Cir. 1981) (Alabama Law); *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977) (Louisiana law). This intra-circuit conflict is accompanied by widespread conflict among the circuits over the question as to what is the most appropriate limitations period to be adopted.

Although comparison of the elements of the state and federal claims is helpful, it should not be decisive. A surer guide to a proper analogy in this context should be the relationship of the state statute of limitations to the underlying substantive claim. Where a state statute of limitations is part of a regulatory scheme that is addressed to misinformation in the sale of securities and uses similar federal statutes as its model, then the claims covered by that statute of limitations are more analogous to rule 10b-5 than are those falling under a catch-all provision that covers a wide variety of disparate conduct. *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 462 (Seitz J. dissenting.)

In both *Wilson v. Garcia*, supra and *Agency Holding Corp. v. Malley-Duff Assoc.*, supra., this Court outlined a procedure to be followed in determining the appropriate statute of limitations for a federal claim. The first step involves characterizing a federal claim. In this step, we must determine whether all claims arising out of the federal statute should be characterized the same way, or evaluated differently depending on the factual circumstances or legal theories involved. *Id.* Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used. *Id.* It is clear that the Fifth Circuit has misconceived and misapplied this procedure. The

Wood court did not characterize all 10b-5 actions the same way. Instead, it analyzed the statutes on an element by element basis, similar to a claim by claim basis. See 643 F.2d at 343. A 10b-5 claim cannot be characterized as a "fraud" claim. This Court has instructed that section 10(b) and common law fraud actions are two distinct breeds. Thus, the Court has refused to impose in the section 10(b) schema the traditional common law requirement in state fraud proceedings that plaintiffs establish their case by clear and convincing evidence. *Herman & Mac Lean v. Huddleston*, 459 U.S. 375, 390 (1983). This Court has indicated that common law doctrines of fraud that developed around transactions involving trangible items of wealth are ill-suited to the sale of intangibles such as securities. *SEC. v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 195, (1963).

The two year limitations statute adopted by the *Wood* court applies to a wide variety of tort actions rather than just common law fraud. It is pointed out that the section 27.01 fraud statute had no limitations period but used the general two year limitations statute. This makes it comparable to a general "catchall" limitations period rejected in *Wilson*, supra and *Agency Holding*, supra. The Fifth Circuit in the instant case erroneously held that the analysis used in *Wood*, supra was consistent with this Court's holdings in *Wilson* supra and *Agency Holding*, supra.

If a state statute of limitations should be used, the proper characterization of these claims should be claims based on a statute comparable to the Texas Securities Act. That statute and other "Blue Sky" laws include a policy of repose more in conformity with the policy of repose deliberately chosen by Congress with respect to claims based on the express provisions of the Securities Exchange Act. Ultimately, the question of which is the appropriate limitations period is one of congressional intent. *Agency Holding*, supra. In view of the foregoing, the Court should take the opportunity afforded by the instant case to clarify the approach to be used in borrowing state

limitations periods for implied causes of action arising under the federal securities laws. The differing approaches taken by the circuit courts has caused considerable confusion and uncertainty. The confusion has mounted to the point where different panels of the Fifth Circuit have taken different approaches to the same issue. Perhaps, in the wake of the Third Circuit's decision in *In Re Data Access Systems Securities Litigation*, supra this Court should determine whether a federal period is more applicable.

In a securities case as in a RICO complaint, the operative (predicate) acts will often occur in several states. A civil rights action will normally involve a dispute wholly within one state. The multistate nature of the federal securities indicates either a uniform federal statute of limitations or a uniform characterization under federal law. A broker in New York, an issuer in Delaware, a purchaser in San Francisco, an accountant in New Jersey and a lawyer in Philadelphia should be subject to the same statute of limitations in federal securities fraud actions. The federal policies at stake and the practicalities of litigation make federal law a significantly more appropriate vehicle for interstitial lawmaking. *Agency Holding* supra. This consideration should apply in this case as a nationwide class of plaintiffs are involved.

III. THE CIRCUIT COURTS ARE IN CONFLICT OVER WHEN THE LIMITATIONS PERIOD BEGINS TO RUN IN IMPLIED ACTIONS UNDER THE FEDERAL SECURITIES LAWS.

The federal doctrine of equitable tolling has been uniformly applied by federal courts in federal securities cases. see *e.g. Suslick v. Rothschild Sec. Corp* 741 F. 2d 1000 (7th Cir. 1984) The problem is that some courts apply it differently in certain aspects than others. For instance, some courts take into account an individual's sophistication in business matters in determin-

ing when the statute begins to run; others apply the objective reasonable investor standard. *ABA Report* 654-655 Because different standards may be applied by different courts and to different plaintiffs, it is impossible to predict when a cause of action will finally be barred. *Id.*

If the express limitations provisions of the 1934 Act, 15 U.S.C. 78 r (c) are adopted by this court, questions will arise as to the meaning of "discovery" in the context of that federal statute. Petitioners expressly reserve the right to brief this particular issue in more detail as the legislative history of the 1934 Act is particularly relevant as to who has the burden of proving when limitations period starts to run and the proper standard of knowledge revelant to tolling questions. see *Congressional Record - Senate* pp 199-200 (May 7, 1934)

This Court should take the opportunity to clarify this recurring problem with limitations period in the federal securities laws.

IV. THE FIFTH CIRCUIT'S REFUSAL TO VACATE THE DISTRICT COURT'S JUDGMENT OF DISMISSAL CONFLICTS WITH THE SEVENTH CIRCUIT AND *EISEN V. CARLISLE & JACQUELIN* WITH RESPECT TO THE RIGHTS OF THE ABSENT CLASS MEMBERS PURSUANT TO RULE 23 (C) (2) FED. CIV. PRO. AND FIFTH AMENDMENT DUE PROCESS.

Petitioners assert that dismissal of this cause without notice to the absent class members, was a violation of Fifth Amendment due process and Rule 23 (c) (2) of the Federal Rules of Civil Procedure.

When a class has been certified as the class here was, under Rule 23 (b) (3) of the Federal Rules of Civil Procedure, notice and an opportunity to "opt-out" must be sent to absent class members. Fed. R. Civ. Pro. 23 (c) (2). Notice to (b) (3) class members is a mandatory and unambiguous requirement of Rule

23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d. 732 (1974) The judgment dismissed all claims in "their entirety". Therefore, the claims on behalf of the class were also dismissed. The Fifth Circuit affirming the District Court's dismissal in its opinion, noted that the case was dismissed before notice was given to the class members; however, it stated, in footnote on page 5 of opinion, that the dismissal "has no effect (sic.) on the rights of the un-notified class members". This dictum is incorrect in several respects: first, it is contrary to the express language of Rule 23 (c) "...the judgment, whether favorable or not, will bind all class members not requesting exclusion..." Rule 23 (c) (2) (b) Fed. R. Civ. Pro.; second, the commencement of a class action tolls the applicable statute of limitations as to all members of the class. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). But, the dismissal of this case may have restarted the running of the limitations against any claims that the un-notified class members may have. An absent class member from New York could rely on his own forum state's six (6) year limitations period. During the pendency of this litigation, limitations have been tolled. *American Pipe*, supra. However, without notice, the absent class member can do nothing to protect his interests. He may not take solace that the doctrines of claim and issue preclusion may not apply to him. The absent class members' rights deserve protection of individual notice which due process requires in the case.

The Advisory Committee's Note to Rule 23, described subdivision (c) (2) as "not merely discretionary" and that the "mandatory notice pursuant to subdivision (c) (2)...is designed to fulfill requirements of due process to which the class action is of course subject." 39 F.R.D. 69, 106-107. Petitioners point out that absent class members may be bound by a judgment where they are in fact adequately represented by the class representative, who is before the Court. *Hansberry v. Lee*, 311

U.S. 32 (1940). The District Court, in certifying the class, expressly found that the Lebmans adequately represented the class, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. *Eisen*, 417 U.S. at 176, 40 L.Ed. 2d at 748. Therefore, the absent class members were entitled to notice prior to the District Court's dismissal.

The Due Process Clause requires, at a minimum, that the absent Plaintiff in a class action must receive notice plus an opportunity to be heard and participate in the litigation whether in person or through counsel. *Phillips Petroleum Co. v. Shutts*, 472 U.S.797 , (1985). An elementary and fundamental requirement of due process is notice, reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). The District Court's dismissal deprived the absent class members of the opportunity to protect their interests. Consequently, the dismissal deprived them of due process and violated Rule 23.

In order to achieve the economy and efficiency of a representative action and to prevent the rule from being utilized solely as a permissive joinder or intervention device, subdivision (c) (2) of Rule 23, purports to include all the members in a Rule 23 (b) (3) class in the final judgment in the suit. Wright and Miller, *Federal Practice & Procedure*. Sec. 1786 (1985). Therefore, notice is crucial to the scheme of Rule 23. The notice serves to inform the absentees, who otherwise might not be aware of the proceeding, that their rights are in litigation so that they can take whatever steps they deem appropriate to make certain that their interests are protected. In this way, it guarantees each class member an opportunity to have his day in court or at least, to oversee the conduct of the action by the class representatives. *Id.* Judgments dismissing the class action, without notice to the

absent class members, are void as a matter of law. *Gert v. Elgin National Industries, Inc.* 773 F2d 154, 159, (7th Cir. 1985); *West v. Capitol Federal Savings and Loan Assn.*, 558 F.2d 977, 980 (10th Cir. 1977). In *Gert*, supra., the Seventh Circuit held, in a securities fraud class action (which was certified as a class), an order dismissing the claim before notice was sent to the absent class members was void. 773 F.2d at 159.

Therefore, the Fifth Circuit has refused to follow the Seventh Circuit by failing to vacate the dismissal judgment as to the absent class members. A horrible injustice has been committed against the absent class members who without notice of any kind cannot effectively protect their rights. What good does declaring that the dismissal judgment has no effect on the unnotified class members rights, if they, through lack of notice, cannot do anything to protect those rights? Rule 23 was designed to protect the rights of absent class members by requiring notice. To hold otherwise, would render Rule 23 a nullity. The district court's dismissal should be vacated as to the absent class members and notice be given to them pursuant to Rule 23 (c) (2).

CONCLUSION

This Court should take the opportunity provided by this case to end this conflict and confusion in this area of the federal securities laws. Opportunity is also presented to redress an injustice to the rights of the absent class members. For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5580

MARVIN LEBMAN, Individually, et al.,

Plaintiffs-Appellants,

Cross-Appellees,

versus

AKTIEBOLAGET ELECTROLUX,

a Swedish Corp., et al.,

Defendants-Appellees,

Cross-Appellants.

Appeals from the United States District Court

for the Western District of Texas

(AUGUST 4, 1988)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Appellant Marvin Lebman challenges the district court's dismissal of his Rule 10(b)(5) class action and pendent state claims. The district

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

court applied the two-year statute of limitations of Texas, the forum state, rather than the three-year rule used in Delaware, the state in which the cause of action arose. Lebman argues that this decision violates the full faith and credit clause of the United States Constitution. The district court ruled, however, that this case is controlled by our decision in Wood v. Combustion Engineering, 643 F.2d 339 (5th Cir. 1981). Because we agree that, under Wood, the two-year statute of limitations is controlling, that no violation of Lebman's constitutional rights has occurred and that the district court properly applied the two-year statute of limitations to all Lebman's claims, we affirm.

I

Marvin and Gerald Lebman, Texas residents, were stockholders in National Union, Inc., a Delaware corporation. On June 20, 1974, Aktiebolaget Electrolux, a Swedish corporation, mailed an offer to purchase all outstanding shares of National Unions's common stock, at $28 per share to all stockholders. Through this offer, Electrolux acquired approximately ninety-two percent of National Unions's outstanding shares; however, a total of 3,596 shareholders, including

the plantiffs, chose not to accept. On August 1, 1975, National Union was merged with an Electrolux subsidiary, NUE, Inc., under the short-form merger provisions of the Delaware General Corporation Law. On August 5, a notice of merger was mailed to all remaining holders of common stock in National Union, including Marvin and Gerald Lebman. The notice explained that these minority shareholders were entitled either to receive $28 per share or to seek an appraisal of the value of the shares pursuant to Delaware law. Most of the minority shareholders accepted the $28 per share offer in August of 1975. The Lebmans and five other shareholders elected to seek an appraisal, which was filed on December 22, 1975. A hearing was conducted, and on November 3, 1978, an appraiser found that as of August 1, 1975, a share of common stock in National Union was worth $24.85 or $3.15 per share less that Electrolux had paid.

Meanwhile, on July 28, 1978, the Lebmans filed this suit in federal district court of Texas for fraud under Rule 10(b)(5). Their claim in its essence is that at the time of the initial tender offer Electrolux fraudulently concealed its intent to merge with National Union to the shareholders' detriment, and then intentionally

undervalued the shares of National Union during the Merger.

Initially the district court permitted this case to proceed under Delaware law. In March 1987, however, the court determined that under our rule in Wood v. Combustion Engineering, 643 F.2d 339 (5th Cir. 1981), the two-year Texas statute of limitations should apply to this Rule 10(b)(5) action because Texas is the forum state, even though the substantive law of Delaware would apply since the merger took place there. The court also found that on each of the thirteen counts raised in the plaintiffs' third amended complaint, the Lebmans had notice of all their claims no later than August 12, 1975, the day they received the document entitled "Notice of Merger." The court found that this document contained sufficient information, to alert the Lebmans not only of the impending merger, but also of the basis of their claims concerning misrepresentation of the value of their shares. Since more than two years had passed from that date until the date the Lebmans filed suit, therefore, the district court dismissed all of their claims.

On appeal, the Lebmans argue that the district court's decision violates the full faith and credit clause of the Constitution. Although they acknowledge that the district court's decision was controlled by our prior holding in Wood, they urge this court to reconsider that decision in the light of two recent Supreme Court cases, Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), and Agency Holding Corp. v. Malley-Duff and Associates, ___ U.S. ___, 107 S.Ct. 2759 (1987). Electrolux cross-appeals, contending that the district court's only error was to certify a class constituting all 3,596 minority shareholders, despite the fact that all but 5 of those shareholders accepted the $28 per share offer made in August 1975.[1] Because we find no error in the district court's decision that all the claims in this case are barred by the statute of limitations, we do not reach the plaintiffs' other issues or issues on cross-appeal.

II

There is no question that our rule in Wood v. Combustion Engineering controls the prescriptive issues as relates to 10(b)(5) claims in this case. It is clearly established that Rule 10(b)(5) actions should be governed by the statute of

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[1]Apparently this class was certified but the case was dismissed before notice was given to any of the class members. The judgement of dismissal below and this opinion, therefore has no affect on the rights of those unnotified class members

limitations of the forum state. McNeil v. Payne Webber Jackson & Curtis, Inc., 598 F.2d 888 (5th Cir. 1979). In Wood, we further held that in Texas a two-year statute of limitations should apply. Wood, 643 F.2d at 345. The Lebmans argue that we should reexamine our holding in Wood in the light of recent Supreme Court opinions, and apply either the Delaware or Texas three-year statute or a comparable rule from federal law. Neither of the Supreme Court cases the Lebmans cite would alter our decision in Wood, however. On the contrary, the decisions in both cases indicate that the analysis used by our circuit in Wood, and by the district court here, is correct. As these cases both carefully explain, "Given our long-standing practice of following state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." Agency Holding, 107 S.Ct. at 2762. Federal statutes of limitations are therefore applied only when "it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." DelCostello v. Teamsters, 462 U.S. at 161. This reasoning is entirely consistent with the analysis used by

this circuit in Wood. Neither case presents any reason to reconsider that holding.

III

Similarly, we find no constitutional violation of the full faith and credit doctrine by applying the Texas statute of limitations here. Lebman attempts to argue that the substantial contacts rule used when determining what substantive law to apply should be extended to the decision of what statute of limitations to use, and would therefore require that the Delaware three-year statute, instead of the Texas two-year statute, be employed. This issue, however, has long been settled. "The full faith and credit clause does not compel the forum state to use the period of limitation of a foreign state." Wells v. Simonds, 345 U.S. 514, 517 (1953). See also Sun Oil Co. v. Wortman, ___ U.S. ___, 56 U.S.L.W. 5601 (June 15, 1988).

IV

The Lebmans also argue that the district court erred when it applied the two-year, instead of the four-year, statute of limitations to those state-based claims in which they allege breach of fiduciary duty. They rely upon two Texas

state court cases, Greenspun v. Greenspun, 198 S.W.2d 82 (Tex. 1946), and Yeaman v. Galveston Co., 167 S.W. 710 (Tex. 1914), in which the four--year limitations period was applied. As this court has noted, however, the type of action that falls within the rule of Greenspun and Yeaman is of a "relatively narrow variety" in which "individual stockholders of a dissolved corporation [sue] to recover their share of its undistributed assets and for related accounting." Maher v. Zapata Corp., 714 F.2d 463 n.50 (5th Cir. 1983). The present action does not fall within that narrow category, and so these cases are not controlling. Instead, the Texas two-year statute of limitations generally applies to breach of fiduciary duty, Crutcher Rolfs Cummings, Inc. v. Ballard, 540 SW2d, 380 (CT. Civ. App. Tx 1976 r'hg den. 1976); International Bankers Life Ins. Co. v. Holloway, 368 SW2d 567 (Tx 1963). Moreover, even though the Lebman's denominate their state-law claims a breach of fiduciary duty, the gravamen of the their state law claims is fraud, making it most analagous to the claims raised by plaintiffs in Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983). In that case, which involved a shareholders action for deceptive practice by the corporation's president in

connection with exchange of stock, we held that: "Texas law indicates that the two-year period of limitations should also be applied to the state statutory and common-law fraud actions." Breen, 695 F.2d at 911 (citations omitted). Thus the district court correctly applied the two-year statute of limitations to the Lebman's state law claims.

V

Finally, the Lebmans complain that the district court erroneously held that they had notice of all their claims on or before August 12, 1975, the day they received the notice of merger. The district court found that the notice of merger plainly and fully described the transaction that was to occur and that the document would put reasonable people on notice of the merger and of the foreseeable consequences of which the Lebmans now complain.[2] We do not find reversible error in this decision.

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[2]The Lebmans claim that the notice of merger was insufficient because it disclosed the amount of a pending lawsuit against a third party, at less than what the corporation eventually demanded in its complaint. The district court opinion gives several sound reasons for its ruling that the notice was sufficient however. Most notably, as the court explains, the notice of merger did not purport to allege the full value claimed but said the corporation intended to sue for an amount of "at least $360,000,000" and this was sufficient notice that the amount could be much higher.

VI

Having thus determined that the two-year statute of limitations applies to all of the Lebmans' claims, and that more than two years elapsed from the date of notice to the date they filed suit, we find that it is not necessary to decide the remaining issues on appeal or cross-appeal.[3]

For these reasons, the judgement of the district court is

A F F I R M E D.

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[3]The appellant's motion to file a supplemental brief has been GRANTED and the brief has been considered.

IN THE UNITED STATES COURT OF APPEALS
OR THE FIFTH CIRCUIT

No. 87-5580

MARVIN LEBMAN, Individually,
ET AL.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

AKTIEBOLAGET ELECTROLUX, A
Swedish Corporation, ET AL.,
Defendants-Appellees,
Cross-Appellants,

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion August 4, 5 Cir., 1988, F.2d)
(August 30, 1988)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in the regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

. . .

ENTERED FOR THE COURT:
(SIGNED)E. Grady Jolly
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARVIN LEBMAN, ET AL., Plaintiffs,	)	
v.	)	
AKTIEBOLEGET ELECTROLUX, ET AL., Defendants,	)	CAUSE NO. SA-78-CA-258

ORDER

ON THIS DATE came on to be considered the Plaintiffs' motion for class certification.

The Plaintiffs to this action, Marvin and Gerald Lebman, are seeking to represent approximately 3,595 former shareholders of National Union Electric Corporation's common stock who, the Plaintiffs allege, were defrauded in connection with the tender offer for shares of National Union Electric Corporation made by Aktieboleget Electrolux. Plaintiffs further allege that a subsequent short-form merger of National Union Electric Corporation into National Union Electric, Inc. was part of a scheme to defraud National Union Electric Corporation minority shareholders. In sum, Plaintiffs contend that the Defendants

engaged in a course of conduct designed to force out minority National Union Electric Corporation shareholders and to fraudulently deprive them of the full value of their stock. After reviewing the materials submitted by the parties and after hearing evidence and argument presented at a hearing on this matter before the Court on November 8, 1984, this Court is of the opinion that class action certification should be granted.

The class sought to be certified involves approximately 3,595 minority shareholders of National Union Electric Corporation who in all likelihood are spread throughout the country. This Court finds that it would be impractical to join all such individuals in this case and that there would be unwarranted costs and inconvenience if the controversy presented by the Plaintiffs were resolved by individual lawsuits.

This Court also finds that the Plaintiffs' claims raise issues of law or fact that are common to all members of the class. All members of the class that will be certified by this Court received copies of the tender offer made by Aktieboleget Electrolux on June 20, 1974, and received notice of the merger of National Union Electric Corporation with National Union Electric, Inc. on August 1, 1975. Both the facts and legal issues involved

in this cause arise from alleged misrepresentations made in connection with the tender offer and subsequent merger and thus this Court is of the opinion that Federal Rule of Civil Procedure 23(a)(2) is satisfied.

The Defendants have asserted that there exists a unique defense against the Plaintiffs in this cause that arises from an appraisal action that occurred in the State of Delaware Chancellory Court. Defendants argue that the res judicata effect of the Delaware Court decision renders Plaintiffs inadequate representatives of the class sought to be represented in this cause. This Court has reviewed the submissions of the parties on this matter and is of the opinion that the res judicata defense available against the Plaintiffs is not likely to consume a significant part of the Plaintiffs' or this Court's energies to the detriment of the class sought to be represented. This Court is of the opinion that the Plaintiffs possess sufficient knowledge and resources to represent the class sought to be certified and, despite the existence of a unique defense against the Plaintiffs, this Court believes that the Plaintiffs will fairly and adequately protect the interests of the class.

Lastly, this Court believes that the questions of law and fact common to the members of the class predominate over any questions relating to individual members and finds that a class action is a superior method to achieve a fair and efficient adjudication of the controversy involved in this cause. This Court finds no interest of individual members of the class to control the prosecution and is unaware of any other proceeding commenced by any member of the class against the Defendants. While this Court does not believe that hearing this cause in the Western District of Texas is necessarily more desirable than having the claims adjudicated in another forum, this Court believes that it is appropriate to concentrate the litigation in one forum and, for that purpose, to concentrate the action in this Court is desirable. Finally, this Court finds that there would be no unusual difficulties encountered in managing this action as a class action. Therefore,

IT IS HEREBY ORDERED that those former shareholders of National Union Electric Corporation's common stock who received and refused to accept an offer made by Aktieboleget Electrolux on June 20, 1974, to purchase their stock at $28.00 per share and who subsequently received notice of

the merger to occur between National Union Electric Corporation and National Union Electric, Inc. on August 1, 1975, be certified as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure to be represented by the Plaintiffs in this cause.

IT IS FURTHER ORDERED that the Plaintiffs shall resubmit a proposed notice to members of the class complying with Rule 23(c)(2) of the Federal Rules of Civil Procedure within fifteen (15) days of the entering of this Order and shall set forth their recommendation as to how this Court should direct notice to members of the class certified.

IT IS FURTHER ORDERED that the Defendants shall respond to the Plaintiffs' proposed notice and proposed method of giving notice by the Court within ten (10) days after having received such proposals from the Plaintiffs.

SIGNED and ENTERED this 20th day of November, 1984, at 3:15 P.M.

(Signed) William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARVIN LEBMAN, ET AL., Plaintiffs,	§	
v.	§	
AKTIEBOLAGET ELECTROLUX, ET AL.,	§	CAUSE NO. SA-78-CA-258
Defendants.	§	

JUDGMENT

ON THIS DATE came on to be considered the Judgment in the above-styled and numbered cause, and

It appearing to the Court that it has by Order this day dismissed this cause with prejudice,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause be and is hereby DISMISSED WITH PREJUDICE, with Plaintiff to bear the costs of court.

SIGNED and ENTERED this 31st day of August, 1987, at 2 P.M.

(Signed) William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

U.S. Constitutional Amendment V

No person shall ..... be deprived of life, liberty, or property, without due process of law.....

Tex. Rev. Civ. Ann. art. 581-33 H. (2) (a) (6)
Art. 581-33 Civil Liabilities
H. Statute of Limitations

(2) No person may sue .....

(a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or

(6) more than five years after the sale; .....

Tex. Civ. Prac. & Rem Code

§ 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

Tex. Rev. Civ. Ann. art. 5526

Art. 5526. Actions to Be Commenced in Two Years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: . . .

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

APPENDIX

Tex. Bus. & Comm. Code § 27

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§ 27.01. Fraud in Real Estate and Stock Transactions

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

a. made to a person for the purpose of inducing that person to enter into a contract; and

b. relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

a. material;

b. made with the intention of not fulfilling it;

c. made to a person for the purpose of inducing that person to enter into a contract; and

d. relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations nidicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.

No. 88-1114

Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARVIN and GERALD LEBMAN,
Petitioners,

v.

AKTIEBOLAGET ELECTROLUX, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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March 1, 1989

List of Parties

The parties to the proceedings below were the petitioners Marvin Lebman and Gerald Lebman. The class they represent consisted of 3,595 other shareholders of National Union Electric Corporation as of August 1, 1975.

The respondents below were Aktiebolaget Electrolux; Dometic, Inc.; and National Union Electric Corporation.

Pursuant to Rule 28.01, respondents make the following disclosure concerning corporate affiliates: In 1987, Dometic, Inc. was merged into White Consolidated Industries, Inc. Other corporate affiliates of White Consolidated Industries, Inc. are as follows:

> The Dometic Corporation; White Consolidated Industries, Inc.; National Union Electric Corporation and Divisions; Swan Services, Inc. (formerly Rollins Building Services); Tecfor, Inc.; Getinge International, Inc.; Appliance Components S.A. de C.V.; Air Machine Corporation; VWS, Inc. (formerly White Sewing Machine Company); Blaw-Knox Construction Equipment Corporation; Copes-Vulcan, Inc.; White Consolidated International Holdings Limited; WCI International Sales Corporation.

TABLE OF CONTENTS

	PAGE
List of Parties	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
ARGUMENT	
I. The Facts of This Case Make It an Unsuitable Vehicle for a Major Review of Statutes of Limitations for Implied Actions	3
II. No True 'Conflict Among the Circuits' Exists on the Statute of Limitations Issue	5
III. The Issue Is Not Yet Ripe for Consideration by This Court	7
IV. The Fifth Circuit's Decision Regarding the Rights of the Absent Class Members Is Correct and Presents No Issue Worthy of Certiorari	7
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Cases

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 8

DelCostello v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) 6

Durham v. *Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988) 7

Eisen v. *Carlisle*, 417 U.S. 156 (1974) 8

Friedlander v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986) 2, 6

Gert v. *Elgin National Industries, Inc.*, 773 F.2d 154 (7th Cir. 1985) 7, 8

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) .. 4, 6

In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988) (en banc), *cert. denied sub nom., Vitiello* v. *I. Kahlowsky & Co.*, — U.S. —, 57 U.S.L.W. 3223 (Oct. 3, 1988) 3, 4, 6, 7

McCray v. *New York*, 461 U.S. 961 (1983) 7

Maryland v. *Baltimore Radio Show*, 338 U.S. 912 (1950) 5

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 2

Wilson v. *Garcia*, 471 U.S. 261 (1985) 2

Wood v. *Combustion Engineering*, 643 F.2d 339 (5th Cir. 1981) 2, 6

Statutes and Rules

PAGE

Supreme Court Rule 17(a) 5

Miscellaneous

ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645 (1986) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1114

MARVIN and GERALD LEBMAN,

Petitioners,

v.

AKTIEBOLAGET ELECTROLUX, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Aktiebolaget Electrolux, Dometic Incorporated and National Union Electric Corporation respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's unreported opinion in this case.

Statement of the Case

Petitioners Marvin and Gerald Lebman are former shareholders of defendant National Union Electric Corporation ("National Union"). Their 127 shares of National Union, which they owned jointly, were lawfully extinguished in a short form merger effected in accordance with Delaware law on August 1, 1975 by defendant Aktiebolaget Electrolux ("Electrolux"). On that date, Electrolux was the owner of 92% of National Union's outstanding shares by virtue of its June 1974 offer to purchase.

Petitioners refused the offer of $28.00 cash per share to which the merger entitled them, and instead litigated to final judgment the value of their National Union shares in a statutory appraisal proceeding conducted in the Delaware courts. The fair value of their shares was there adjudged to be $24.85 each.

Almost three years later, after the appraisal hearing in February 1978 but prior to the entry of judgment in the Delaware Chancery Court—perhaps sensing that the Delaware proceedings would produce unsatisfying results— petitioners commenced this action on July 28, 1978 in the district court. This action saw four versions of petitioners' complaint, and an ever-shifting theory of the case.[1] In the end, however, the district court dismissed it as time-barred, relying on valid Fifth Circuit precedent.[2] The Fifth Circuit affirmed.

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[1] Throughout most of this action, the "essence" of petitioners' case (*cf.* Pet. 1) was that respondents had improperly undervalued the shares of National Union at the time of the tender offer and subsequent merger by not including a large component of value to reflect National Union's then-pending $360 million antitrust action against Japanese television manufacturers (*see* Pet. 9a n.2). At the time, of course, the outcome of that action was entirely unpredictable; assigning it any cash value was not required by any rule of law and would have been foolish.

This Court's dismissal of that action in 1986, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), brought petitioners' complaints on that subject to a sudden stop, and apparently refocused their attention on other of the 13 causes of action in their Third Amended Complaint (*see* Pet. 1).

[2] *Wood* v. *Combustion Engineering*, 643 F.2d 339 (5th Cir. 1981). After the decision of the Fifth Circuit, the Eleventh Circuit reviewed *Wood* in *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986), a case cited by petitioners (Pet. 6), in light of this Court's holding in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), another case cited and heavily argued by petitioners (Pet. 2, 3, 5-7). The *Friedlander* court, in contrast to petitioners' assertions (Pet. 5-6), expressly approved the holding in *Wood* even after and in light of *Wilson*. *Friedlander*, *supra*, 788 F.2d at 1509.

Petitioners state here that the "essence" of their claims is now that (i) at the time of the tender offer (which they did not accept) Electrolux omitted to state what they claim was "its intent to merge with National Union" (Pet. 1), and (ii) Electrolux intentionally undervalued the shares of National Union during the merger.

Both claims—and all eleven other asserted in the Third Amended Complaint—are time-barred, as both the district court and the Fifth Circuit found. Moreover, having already litigated the issue of value in Delaware, principles of res judicata bar petitioners from relitigating it in this case.

ARGUMENT

I.

The Facts of This Case Make It an Unsuitable Vehicle for a Major Review of Statutes of Limitations for Implied Actions.

Even were there an immediate need for the Court to conduct the major review of § 10(b) statutes of limitations that petitioners advocate (and there is no such need, see Point II, *infra*), this case is unsuited to the purpose.

First, petitioners point to *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988) (en banc), *cert. denied sub nom., Vitiello* v. *I. Kahlowsky & Co.*, — U.S. —, 57 U.S.L.W. 3223 (Oct. 3, 1988), and argue that it creates a conflict in the circuits on the issue of the applicable statute of limitations for § 10(b) actions. Petitioners laud the "extensive and well reasoned analysis of Judge Aldisert in *In re Data Access*" (Pet. 4), as if they

have an interest in obtaining the same holding in this case, but fail to mention that their case would be barred by the holding of *In re Data Access*.[3] Consequently, the Court's resolution of this purported "conflict" between *In re Data Access* and this case would be irrelevant to the ultimate outcome in this case.[4]

Second, one of petitioners' two essential claims, as they now describe them, is that their shares were "intentionally" undervalued during the short form merger (Pet. 1).[5] But petitioners omit to inform the Court that this centerpiece claim of theirs is barred by res judicata, since petitioners

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[3] *In re Data Access* held that the appropriate limitations period for complaints asserting violations of § 10(b) is the uniform period found in companion provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j *et seq.*: one year after discovery of facts constituting a violation and in no event more than three years after such violation.

In this case, the district court found, and the Fifth Circuit expressly affirmed (Pet. 5a), that the petitioners

> "had notice of all their claims no later than August 12, 1975, the day they received the document entitled 'Notice of Merger.'" (Pet. 4a).

This action was commenced almost three years later, on July 28, 1978 (Pet. 3a), and would therefore be barred by the "one year from discovery" holding of *In re Data Access*.

[4] Respondents recognize the possibility that the Court, upon addressing this issue, could endorse an approach other than the currently prevailing "absorption doctrine," *see, e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946), or the Third Circuit's new one-year/three-year standard (*see* n.3 *supra*), and that the Court's solution could remove the time bar from this claim. But both current alternatives bar petitioners' claims.

[5] In that transaction, the 8% of National Union's outstanding shares that remained in the hands of minority shareholders were extinguished pursuant to Delaware law and converted to the right to receive $28.00 per share in cash or an appraisal in the Delaware courts.

themselves litigated the issue of value to final judgment in the Delaware Supreme Court.[6]

Third, this case was resolved on motion papers in the district court, and thus lacks the well-developed record that an evidentiary trial would have created. As such, although the timing of the petitioners' discovery of crucial facts is clear, on certain other issues the record may be "cloudy", *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.) and another case would present the Court with a cleaner record.[7] That later case, rather than petitioners', is the case in which the Court might review the far-reaching question sought to be raised by petitioners.

II.

No True 'Conflict Among the Circuits' Exists on the Statute of Limitations Issue.

The Third Circuit has not "rendered a decision in conflict with" the decisions of other circuits. *See* Sup. Ct. R. 17(a). While no other court of appeals has adopted a § 10(b)

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[6] *Petitioners Are Unrepresentative Plaintiffs.* Respondents argued below that this basic difference between petitioners' legal position and that of the absent 3,591 class members made them unsuitable class representatives. The district court rejected the argument, and respondents took a cross-appeal. The Fifth Circuit failed to reach the issue because it affirmed the district court's dismissal on the statute of limitations (Pet. 5a).

[7] The Court in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950), stated:

> "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by lower courts. Wise adjudication has its own time for ripening." *Id.* at 918.

limitations period similar to that embraced by the Third Circuit in *In re Data Access*, the circuits have followed different paths on this issue for decades. The adoption by one court of appeals of a federal statute of limitations hardly marks a dangerous departure requiring the immediate attention of the Court.

This Court has long deemed Congress to have intended that the federal courts "apply the most closely analagous statute of limitations under state law." *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (footnote omitted) *citing Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).[8] Implicit in that well-traveled approach is an acceptance of diverse periods of limitation. And that diversity of standards—which in part reflects no more than the states' sundry approaches to limitations periods governing claims of fraud and blue sky violations—has not drastically impeded litigants or the lower courts.[9] The petitioners' argument to the contrary is unfounded.

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[8] This, of course, is the precise approach adopted by the Fifth Circuit in *Wood* v. *Combustion Engineering*, 643 F.2d 339 (5th Cir. 1981), the precedent upon which its dismissal of petitioners' appeal rested. *See also Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986).

[9] *See* ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986):

> "Four of the twelve federal circuits consistently apply the blue sky limitations period [of the forum state]; three others consistently use the state common law fraud period." *Id.* at 650 (footnote omitted).

The committee's report argues that national uniformity would be desirable and concludes that "[t]he only solution is for Congress to enact a uniform rule 10b-5 limitations period." *Id.* at 656.

III.

The Issue Is Not Yet Ripe for Consideration by This Court.

In re Data Access has been the law in the Third Circuit only since June 30, 1988. Other circuits have not yet weighed in with their comments.[10] Future cases in other circuits may well resolve the "conflict" in ways not currently foreseen. The Third Circuit's own decisions may season its new holding in ways that will materially enhance later consideration by this Court, if necessary. Certiorari on the issue is premature. *See, e.g., McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.), (certiorari denied where the issue requires "further study" in lower courts "before it is addressed by this Court").

IV.

The Fifth Circuit's Decision Regarding the Rights of the Absent Class Members Is Correct and Presents No Issue Worthy of Certiorari.

Petitioners contend [11] that the Fifth Circuit's decision is inconsistent with a recent Seventh Circuit ruling[12] concerning

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[10] In *Durham* v. *Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), the Eleventh Circuit noted the existence of *In re Data Access* but adhered to its own rule. As of January 22, 1989, no other court of appeals, apart from the Third Circuit, had been noted on the Shepard's service carried on Lexis as having even cited *In re Data Access*.

[11] See Petition at 9-12.

[12] *Gert* v. *Elgin National Industries, Inc.*, 773 F.2d 154 (7th Cir. 1985).

the effect of dismissal of the named representatives' suit on the rights of the unnotified, absent class members. It is not. The decisions are nearly identical and are in harmony with this Court's decision in *Eisen* v. *Carlisle*, 417 U.S. 156 (1974), and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). There is no need for the Court to revisit this well-settled issue in this case.

In *Gert* v. *Elgin National Industries, Inc.*, 773 F.2d 154, 159-60 (7th Cir. 1985), the Seventh Circuit held that the dismissal of the named plaintiff's § 10(b) securities fraud action did not bar claims by the absent class members because they had not received notice of certification before the plaintiff's action was dismissed.

This is exactly what the Fifth Circuit held in *this* action:

> "Apparently, this class was certified but the case was dismissed before notice was given to any of the class members. The judgment of dismissal below and this opinion, therefore has [sic] no affect [sic] on the rights of those unnotified class members." (Pet. 5a).

While the named plaintiffs' action is time-barred, their failure to notify the absent class members before the district court entered summary judgment dismissing their claims merely prevents that decision from applying classwide. Petitioners should not now be heard to argue that their own failure to give the notice directed by the district court should somehow now entitle them to have their case reviewed by this Court.

Petitioners argument that the absent class members are somehow prejudiced by this result is illogical. Since the class was never notified of the pendency of this action, no class members could have been relying on its pendency to

"protect their rights" (Pet. 12) or even to toll the statute of limitations. How they are prejudiced by its dismissal without notice to them is left unexplained by the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 1, 1989

Respectfully submitted,

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No. 88-1114

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARVIN AND GERALD LEBMAN, PETITIONERS

v.

AKTIEBOLAGET ELECTROLUX, ET AL.

REPRINTED COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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308

QUESTIONS PRESENTED

1. Whether, in this class action, class members who had not been notified of the certification of the class should have been given notice of the dismissal of the action.

2. Whether the statute of limitations for implied private rights of action under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78n(e), and Rule 10b-5 under the Exchange Act, 17 C.F.R. 240.10b-5, should be drawn from state law or from an express limitations period found in the federal securities laws.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	3
Conclusion	20
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 19
Agency Holding Corp. v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987) 3, 6, 8, 9, 10, 11, 12, 17
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 5
Armstrong v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983) 6
Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) 5
Basic Inc. v. *Levinson*, 108 S. Ct. 978 (1988) 5, 10, 11
Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985) 10
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 5, 10, 11
Carothers v. *Rice*, 633 F.2d 7 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981) 6, 11
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 3
Charney v. *Thomas*, 372 F.2d 97 (6th Cir. 1967) 6
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 19
Clinton Oil Co. Securities Lit., In re, [1977-1978] Fed. Sec. L. Rep. (CCH) ¶ 96,015 (D. Kan. 1977) 12
Data Access Systems Securities Litigation, In re, 843 F.2d 1537 (3d Cir.), cert. denied, 109 S. Ct. 131 (1988) 3, 7, 9, 10, 11
Davis v. *Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988) 6, 14
DelCostello v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983) 6, 8, 9, 14, 19
Dirks v. *SEC*, 463 U.S. 646 (1983) 10

Cases—Continued: Page

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 5, 6, 16, 17
Forrestal Village, Inc. v. *Graham*, 551 F.2d 411 (D.C. Cir. 1977) 6
Friedlander v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986) 6, 9
General Builders Supply Co. v. *River Hill Coal Venture*, 796 F.2d 8 (1st Cir. 1986) 7
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983).. 5, 6, 10, 11, 16, 17
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 5, 9, 14
Jensen v. *Snellings*, 841 F.2d 600 (5th Cir. 1988) 7
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) 5
LaRosa Building Corp. v. *Equitable Life Assurance Society*, 542 F.2d 990 (7th Cir. 1976) 6
Loveridge v. *Dreagoux*, 678 F.2d 870 (10th Cir. 1982) 6
Maggio v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987) 7
Marx v. *Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985) 6-7
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 9
Merrill Lynch Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 13
Morris v. *Stifel, Nicolaus & Co.*, 600 F.2d 139 (8th Cir. 1979) 6
Norris v. *Wirtz*, 818 F.2d 1329 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987) 7, 14
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) .. 9
O'Hara v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981) 6
Owens v. *Okure*, 109 S. Ct. 573 (1989) 15
Reed v. *United Transportation Union*, 109 S. Ct. 621 (1989) 8
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, No. 88-385 (May 15, 1989) 19
Sante Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977) 10

Cases—Continued: Page

SEC v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) 10
Superintendent of Insurance v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 5
Teamsters Local 282 Pension Trust Fund v. *Angelos*, 815 F.2d 452 (7th Cir. 1987) 7
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 9
United States v. *Mendenhall*, 446 U.S. 544 (1980) 19
Wachovia Bank & Trust Co. v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981) 6
Wilson v. *Garcia*, 471 U.S. 261 (1985) 3, 8, 10
Wood v. *Combustion Engineering, Inc.*, 643 F.2d 339 (5th Cir. 1981) 2, 11
Youakim v. *Miller*, 425 U.S. 231 (1976) 19
Zola v. *Gordon*, 685 F. Supp. 354 (S.D.N.Y. 1988) 14

Statutes, regulations and rules:

Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076 15
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704:
§ 5, 102 Stat. 4680-4681 (to be codified at 15 U.S.C. 78t-1) 4, 13
§ 20A, 15 U.S.C. 78t-1 ..... 4, 12, 14, 15, 16, 17, 18, 19
§ 20A(a), 15 U.S.C. 78t-1(a) 13
§ 20A(b)(4), 15 U.S.C. 78t-1(b)(4) 13, 14
§ 20A(d), 15 U.S.C. 78t-1(d) 14, 15, 16
§ 9, 102 Stat. 4684 (to be codified at 15 U.S.C. 78*o* Note) 19
Rules of Decision Act, 28 U.S.C. 1652 5
Securities Act of 1933, 15 U.S.C. 77(a) *et seq.*:
§ 2, 15 U.S.C. 77b 12
§ 11, 15 U.S.C. 77k 16
§ 12, 15 U.S.C. 77*l* 16
§ 13, 15 U.S.C. 77m 16
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 9, 15 U.S.C. 78i 15, 16

Statutes, regulations and rules – Continued: Page

§ 9(e), 15 U.S.C. 78i(e) 15
§ 10(b), 15 U.S.C. 78j(b) 2, 3, 5, 9, 16
§ 14(e), 15 U.S.C. 78n(e) 2, 9
§ 16(b), 15 U.S.C. 78p(b) 16
§ 18(c), 15 U.S.C. 78r(c) 15
§ 27, 15 U.S.C. 78aa 12
§ 29, 15 U.S.C. 78cc 15
§ 29(b), 15 U.S.C. 78cc(b) 15

17 C.F.R. 240.10b-5 ..... *passim*

Miscellaneous:

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78 Cong. Rec. 8198-8201 (1934) 14

134 Cong. Rec.:
H7470 (daily ed. Sept. 13, 1988) 15
S17,220 (daily ed. Oct. 21, 1988) 15

Federal Securities Code (1980) 16

T. Hazen, *The Law of Securities Regulation* (1985) 7

H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. (1934) ... 14

H.R. Rep. No. 910, 100th Cong., 2d Sess. (1988) 13, 15

L. Loss, *Fundamentals of Securities Regulation* (2d ed. 1988) 7, 11, 16

Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 Duke L.J. 1125 7

Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 Wayne L. Rev. 635 (1967) 7

In the Supreme Court of the United States

OCTOBER TERM, 1988

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, residents of Texas, were stockholders of National Union, Inc., a Delaware Corporation. On June 20, 1974, Aktiebolaget Electrolux, a Swedish corporation, mailed tender offer materials to National Union shareholders offering to purchase all of the outstanding common stock of National Union at $28 per share. In response, approximately 92% of the outstanding common shares of National Union were tendered to Electrolux. Petitioners, however, did not accept the Electrolux offer and thus retained their National Union shares. On August 1, 1975, a subsidiary of Electrolux was merged with National Union pursuant to the short-form merger provisions of Delaware General Corporation Law. Pet. App. 2a-3a.

On August 5, 1975, Electrolux mailed a notice to the remaining holders of National Union common stock, including petitioners, advising them of the merger. The notice advised the

minority shareholders of their right to receive $28 per share or to seek an appraisal of their National Union stock pursuant to Delaware law. On December 22, 1975, petitioners and five other shareholders sought an appraisal in Delaware Chancery court. On November 3, 1978, an appraiser, following a hearing, found that as of August 1, 1975, the common stock of National Union was worth $24.85 per share. Pet. App. 2a-3a.

2. On July 28, 1978, prior to the appraisal, petitioners filed suit in the United States District Court for the Western District of Texas. They alleged that at the time of the tender offer, Electrolux had fraudulently concealed its intent to merge with National Union, and had then intentionally undervalued the shares during the merger, in violation of, *inter alia,* Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78n(e), and Rule 10b-5 under the Exchange Act, 17 C.F.R. 240.10b-5. Pet. App. 3a-4a. Petitioners sought to represent a class consisting of the 3,596 shareholders who had declined to tender their shares to Electrolux. Although the district court certified such a class, no notice of class certification was ever sent to the absent class members. Pet. App. 5a, 12a-16a.

In 1987, the district court dismissed the action, concluding that the statute of limitations had run.[1] The court found that the applicable statute of limitations was the two-year period for claims arising under the Texas general fraud statute. Applying that statute, the court determined that petitioners had notice of all of their claims no later than August 12, 1975, when they received the notice of merger mailed by Electrolux. Because petitioners had waited more than two years from that date before filing suit, the action was time-barred. Pet. App. 4a.

3. The court of appeals affirmed. The court noted that under its decision in *Wood* v. *Combustion Engineering, Inc.*, 643 F.2d 339 (1981), the district court had correctly chosen the Texas general fraud statute of limitations for claims arising

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[1] The delay in resolving this issue apparently resulted from protracted litigation over whether the court had personal jurisdiction of the foreign defendants. See Pet. 1.

under Section 10(b) of the Exchange Act and Rule 10b-5. Pet. App. 5a. The court of appeals rejected petitioners' suggestion that *Wood* should be reexamined in light of recent decisions of this Court, and that "either the Delaware or Texas three-year statute or a comparable rule from federal law" should be applied. Pet. App. 6a. The court held that its application of state law to Rule 10b-5 actions was compatible with the analysis used by this Court in *Wilson* v. *Garcia,* 471 U.S. 261 (1985), and *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987). Pet. App. 5a-7a. The court also upheld the district court's conclusion that petitioners "had notice of all their claims on or before August 12, 1975, the day they received the notice of merger." Pet. App. 9a. In a footnote, the court noted that because the district court had dismissed the case before giving notice to the class members, the judgment "has no [e]ffect on the rights of those unnotified class members." *Id.* at 5a n.1.

DISCUSSION

" 'Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson* v. *Garcia,* 471 U.S. at 266, quoting *Chardon* v. *Fumero Soto,* 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting). For decades, the courts of appeals have been divided over the correct statute of limitations to apply to implied private actions under Rule 10b-5. Although the courts of appeals until recently uniformly applied limitations periods drawn from the law of the forum state, disagreement abounded as to which type of state statute is most suitable. This state of affairs changed significantly in 1988, when the Third Circuit, sitting en banc, rejected the "absorption" of state statutes of limitations for 10b-5 purposes. Instead, the en banc court adopted a limitations period drawn from federal law. *In re Data Access Systems Securities Litigation,* 843 F.2d 1537, 1550 (3d Cir.), cert. denied, 109 S. Ct. 131 (1988).

In the wake of the *Data Access* decision, four principal options are available to courts for determining the appropriate

limitations periods for Rule 10b-5 actions, two drawn from state law and two from federal law. Looking to state law, courts could adopt the forum state's limitations period either for common law fraud or for statutory "blue sky" law actions. Looking alternatively to federal law, courts, following *Data Access,* could adopt the limitations periods for the express rights of action originally provided in the Exchange Act (which generally provide for a period of one year from discovery of the facts constituting the violation, but not later than three years after the violation), or they could apply the limitations period set forth in Section 20A of the Exchange Act, added by the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4680-4681 (to be codified at 15 U.S.C. 78t-1) (which provides for a period of five years from the last unlawful transaction).

In our view, Rule 10b-5 actions would be better served by a uniform statute of limitations drawn from federal law. Federal securities litigation is inherently national in scope, varied in nature, and in need of a single, easily applied rule. The use of diverse state limitations periods cannot satisfy that goal. We thus agree with the *Data Access* court that the traditional approach of absorbing analogous state statutes of limitations is inappropriate in this context. Of the competing federal alternatives, however, we believe that the closer, more suitable analogy is found in the limitations period contained in Section 20A of the Exchange Act.

The question of the appropriate statute of limitations for implied private actions under Rule 10b-5 is an important question that warrants this Court's consideration. Nevertheless, this case presents a less than ideal vehicle for the Court's review. Because Section 20A was passed after the decision below was rendered, the court of appeals did not have an opportunity to consider that statute as a possible source for a limitations period drawn from federal law, and petitioners do not rely on it in their certiorari petition. Moreover, no other court of appeals has considered the use of the Section 20A period to limit Rule 10b-5 claims; initial consideration of this possibility in the circuit

courts may prove useful before this Court's resolution of the question. For these reasons, although the case otherwise appears properly to present the limitations question, we suggest that the petition be denied.[2]

1. Congress did not expressly create a private cause of action in the Exchange Act under Section 10(b); accordingly, there is no express limitations period for implied actions under Rule 10b-5.[3] In the absence of a specific federal statute of limitations to apply, "the federal courts have generally looked to local law as the source of a federal limitation period." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 557 n.27 (1974); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-705 (1966); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).[4]

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[2] The first question presented in the petition (Pet. i), whether notice should have been provided to absent class members of the dismissal of this action, does not warrant this Court's review. The court of appeals may have erred in not requiring such notice, because even though no notice of class certification had been provided, some class members may have been aware of the action and relied on it to protect their interests. But the error, if it was one, concerns a narrow and essentially fact-bound question not likely to recur. Moreover, the discussion of this issue in the unpublished opinion below is rather cryptic and seems unlikely to influence future class actions. Above all, there is no conflict with respect to this question.

[3] Section 10(b) of the Exchange Act and Rule 10b-5 do not create an express private right of action for persons injured through violations of those provisions. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 729-730 (1975). Shortly after the Securities and Exchange Commission adopted Rule 10b-5, however, a district court held that there is an implied right of action under Rule 10b-5. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Since that time, an implied right of action under Rule 10b-5 has been uniformly recognized by the courts and sanctioned by congressional acquiescence. *Basic Inc.* v. *Levinson*, 108 S. Ct. 978, 982-983 (1988). The existence of an implied right of action under Section 10(b) and Rule 10b-5 "is simply beyond peradventure." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380-381 & n.10 (1983); *Basic Inc.* v. *Levinson*, 108 S. Ct. at 982; *Hochfelder*, 425 U.S. at 196; *Blue Chip Stamps*, 421 U.S. at 730; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

[4] The Rules of Decision Act, 28 U.S.C. 1652, directs courts to apply state law in this setting, "unless 'a timeliness rule drawn from elsewhere in federal

Under the theory of "implied absorption" of state limitations periods into federal law, *ibid.*, courts in Rule 10b-5 actions have, until recently, routinely applied the state limitations period providing the most appropriate analogy to the federal cause of action.[5]

The reference to state law, however, has yielded confusing and inconsistent results. Through the early 1970s, courts favored the limitations periods applicable to common law fraud.[6] Although three courts of appeals continue to apply that approach,[7] more recently courts have gravitated toward borrowing the limitations periods of state blue sky statutes. Five courts of appeals now consistently apply blue sky law.[8] Two courts of appeals, however, apply both fraud and blue sky law, depending on the State within the circuit.[9] One court of appeals

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law should be applied.' " *Agency Holding Corp.*, 107 S. Ct. at 2762 (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983)).

[5] On two occasions, this Court has noted the prevailing practice of the lower courts to borrow the forum state's statutes of limitations in actions under Rule 10b-5. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 196 & n.29. *Herman & MacLean* v. *Huddleston*, 459 U.S. at 384 & n.18. In neither instance, however, did the Court pass on the appropriateness of that practice.

[6] See *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 348 & n.12 (D.C. Cir. 1980) (citing decisions as of 1971 from seven courts of appeals applying the fraud statute, while one court of appeals had applied the blue sky period), cert. denied, 452 U.S. 954 (1981).

[7] See *Armstrong* v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983); *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988); *Loveridge* v. *Dreagoux*, 678 F.2d 870 (10th Cir. 1982).

[8] See, *O'Hara* v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981); *LaRosa Building Corp.* v. *Equitable Life Assurance Society*, 542 F.2d 990 (7th Cir. 1976); *Morris* v. *Stifel, Nicolaus & Co.*, 600 F.2d 139 (8th Cir. 1979); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986); *Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411 (D.C. Cir. 1977).

[9] For example, the Sixth Circuit applies the Kentucky three-year blue sky statute to Rule 10b-5 claims, but apples the six- and four-year common law fraud statutes, respectively, to actions governed by Michigan and Ohio law. See *Carothers* v. *Rice*, 633 F.2d 7 (1980) (Kentucky law), cert. denied, 450 U.S. 998 (1981); *Charney* v. *Thomas*, 372 F.2d 97 (1967) (Michigan law); *Marx*

applies the state personal injury statute.[10] And as discussed above, the Third Circuit has recently held that "the express limitations sections of the Securities Exchange Act of 1934 provide the preferable source of limitations borrowing" for Rule 10b-5. *Data Access,* 843 F.2d at 1550.[11]

Courts[12] and commentators[13] have criticized the unpredictable and inconsistent treatment of statutes of limitations issues under Rule 10b-5. In 1986, the American Bar Association's Committee on Federal Regulation of Securities concluded:

> Such disarray serves no public purpose. This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states.

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v. *Centran Corp.*, 747 F.2d 1536 (1984) (Ohio law), cert. denied, 471 U.S. 1125 (1985). Likewise, the Fifth Circuit applies the fraud statute of limitations in actions governed by Texas law, as it did in this case, but applies the blue sky statute in actions governed by Louisiana law, see *Jensen* v. *Snellings,* 841 F.2d 600, 606 (1988).

[10] See *Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987); *General Builders Supply Co.* v. *River Hill Coal Venture,* 796 F.2d 8 (1st Cir. 1986).

[11] The appendix contains a table summarizing, by circuit, the differing approaches to the appropriate statute of limitations for Rule 10b-5. The appendix is based upon the American Bar Association's Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions,* 41 Bus. Law. 645, 659-661 (App. A) (1986), updated to reflect the current state of the law.

[12] See, *e.g.*, *Data Access,* 843 F.2d at 1539-1540; *Norris* v. *Wirtz,* 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987); *Teamsters Local 282 Pension Trust Fund* v. *Angelos,* 815 F.2d 452, 455 (7th Cir. 1987).

[13] See, *e.g.*, L. Loss, *Fundamentals of Securities Regulation* 994-996 (2d. ed. 1988); Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5,* 1972 Duke L.J. 1125, 1142-1150; Bloomenthal, *Statutes of Limitations and the Securities Acts—Part I,* 7 Sec. & Fed. Corp. L. Rep. 17-24 (Mar. 1985); T. Hazen, *The Law of Securities Regulation* § 13.8 & n.2 (1985); Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion,* 13 Wayne L. Rev. 635 (1967); Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity,* 7 Sec. Reg. L.J. 374 (1980).

> Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorneys' fees are wasted.

Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Law. 645, 647 (1986) [hereinafter *ABA Task Force Report*].

2. This Court has recently clarified the standards for determining the appropriate statute of limitations when a federal statute is silent as to the applicable limitations period. See *Reed* v. *United Transportation Union,* 109 S. Ct. 621 (1989); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc., supra; Wilson* v. *Garcia, supra; DelCostello* v. *International Bhd. of Teamsters,* 462 U.S. 151 (1983). The first step of the inquiry is to determine "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.' " *Agency Holding Corp.,* 107 S. Ct. at 2762; *Reed,* 109 S. Ct. at 626-627. The characterization of a federal claim for this purpose is usually governed by federal law. *Agency Holding Corp.,* 107 S. Ct. at 2762; *Wilson* v. *Garcia,* 471 U.S. at 269-270.

The second step is the selection of a limitations period from state or federal law. *Agency Holding Corp.,* 107 S. Ct. at 2762. In view of the Court's historical borrowing of state law, it can generally be assumed "that Congress intended by its silence that we borrow state law." *Ibid.* However, " 'state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law,' " *ibid.,* in which case a federal statute may supply the better choice. "[R]esort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *DelCostello,* 462 U.S. at 171-172 (applying limitations period provided in

Section 10(b) of the National Labor Relations Act to Section 301/fair representation claims); see *Agency Holding Corp.*, 107 S. Ct. at 2762-2763 (applying Clayton Act limitations period to civil RICO); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977) (refusing to apply a state statute of limitations to EEOC enforcement actions); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (applying Jones Act statute of limitations to federal seaworthiness action); *Holmberg* v. *Armbrecht, supra* (applying federal doctrine of laches, rather than state limitations period, to equitable enforcement of federal right).[14]

a. The initial question is whether all Rule 10b-5 claims should be characterized in the same fashion for statute of limitations purposes. We believe that the approach of "color-matching," or choosing a period of limitations on a claim-by-claim basis, is inappropriate for Rule 10b-5 litigation. See *Data Access*, 843 F.2d at 1543 (rejecting "color matching" for Rule 10b-5 claims); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d at 1504 (same).

Like RICO and Section 1983, Rule 10b-5 " 'encompass[es] numerous and diverse topics and subtopics.' " *Agency Holding Corp.*, 107 S. Ct. at 2763. An action under Section 10(b) and

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[14] This Court has noted that the analysis outlined in the text may "make[ ] more sense as applied to a cause of action expressly created by Congress than as applied to one found by the courts to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief." *DelCostello*, 462 U.S. at 158-159 n.12. See also *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring). Whatever the general merits of this suggestion, however, the judicial implication of a right of action under Rule 10b-5 for over forty years, coupled with Congress's ratification of that development, persuades us that it is appropriate in this context to apply the analysis developed in *Reed*, *Agency Holding Corp.*, and *DelCostello*. Accordingly, we do not think that this case provides an occasion to decide whether implied causes of action generally deserve a different set of presumptions. Cf. *DelCostello*, 462 U.S. at 158-159 n.12.

We also believe that the analysis and conclusions we reach for Rule 10b-5 generally apply as well to the implied cause of action in the tender offer context under Section 14(e) of the Exchange Act, since both Rule 10b-5 and Section 14(e) prohibit fraudulent conduct in connection with securities transactions.

Rule 10b-5 "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance.' " *Huddleston,* 459 U.S. at 382. Accordingly, "[S]ection 10(b) and Rule 10b-5 embrace a galaxy of actions." *Data Access,* 843 F.2d at 1543.[15] This diversity readily permits analogy to actions for common law fraud, breach of contract, breach of fiduciary duty, misappropriation, and violation of blue sky laws, among others. Attempting to matching the varied fact patterns and legal theories of each Rule 10b-5 claim would "inevitably breed[ ] uncertainty and time-consuming litigation." *Wilson,* 471 U.S. at 272. Consequently, as the Court concluded with respect to civil RICO claims in *Agency Holding Corp.,* Section 1983 claims in *Wilson,* and union free speech claims in *Reed,* Rule 10b-5 claims should be characterized uniformly.

b. The second inquiry is "whether a federal or state statute of limitations should be used." *Agency Holding Corp.,* 107 S. Ct. at 2762.

(1) As the deep division among the courts of appeals illustrates, there is no adequate state law analogy for Rule 10b-5 claims. Common law fraud doctrines were developed in contexts "light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps,* 421 U.S. at 744-745; see *Basic,* 108 S. Ct. at 989-990; *SEC* v. *Capital Gains Research Bureau,* 375 U.S. 180, 194-195 (1963).

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[15] For example, Rule 10b-5 actions can be brought against the issuer of securities for false or misleading material public statements, see *Basic Inc.* v. *Levinson,* 108 S. Ct. 978, 981 (1988); against accountants, lawyers, or others involved in an offering of securities, see *Huddleston,* 459 U.S. at 378; against broker-dealers by customers fraudulently induced to purchase securities, see *Bateman Eichler, Hill Richards, Inc.* v. *Berner,* 472 U.S. 299, 301-303 (1985); against persons who trade in the securities markets while in possession of non-public information in breach of a fiduciary or other duty, cf. *Dirks* v. *SEC,* 463 U.S. 646, 653-654 (1983); against tippees of such persons who trade on inside information when they know, or should have known, of the breach, cf. *id.* at 660-664; against persons who manipulate the market for securities, cf. *Santa Fe Indus., Inc.* v. *Green,* 430 U.S. 462, 476-477 (1977), and in many other situations.

Indeed, one of Congress's paramount objectives in enacting Section 10(b) was to "rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct." *Herman & MacLean* v. *Huddleston,* 459 U.S. at 388-389. Thus, "[a]ctions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, and are in part designed to add to the protections provided investors by the common law." *Basic,* 108 S. Ct. at 990 n.22 (citations omitted). Given these recognized differences, common law fraud provides an imperfect analogy for selecting a statute of limitations.

Likewise, the blue sky civil remedy provisions "come[ ] in a variety of shapes and sizes," frequently varying considerably from comparable federal remedies. L. Loss, *supra,* at 877-878. Blue sky law private actions, in contrast to private actions under Rule 10b-5, may not require scienter or reliance, and may provide relief only for purchasers, not sellers. See *Wood* v. *Combustion Engineering, Inc.,* 643 F.2d at 345-346. Moreover, many blue sky statutes provide only rescission rights, not the recovery of damages, and do not permit actions against brokers-dealers, attorneys, or accountants. See *Data Access,* 843 F.2d at 1543-1544. Consequently, even circuits that apply blue sky law in one state may turn away from it in other states because of particular features of those states' statutes. See *Carothers* v. *Rice,* 633 F.2d 7 (6th 1980), cert. denied, 450 U.S. 998 (1981). In view of the nuances and variation among the state securities laws, their limitations periods do not provide a promising source for a uniform, predictable rule.

More fundamentally, resort to state law in any form overlooks the fact that the securities markets regulated by the Exchange Act are inherently national in scope. See *Blue Chip Stamps,* 421 U.S. at 744-745. "Issues are usually marketed through underwriters and dealers, often including scores of investment banking and brokerage firms across the country." *Id.* at 758 (Powell, J., concurring). As with RICO, *Agency Holding Corp.,* 107 S. Ct. at 2766, the securities laws are built around a jurisdictional nexus to interstate commerce or the mails, and were in part enacted because no single state's laws were capable

of regulating the nation's capital markets. See 15 U.S.C. 77b. Moreover, the national nature of the securities exchanges often guarantees that "the statute of limitations of several States could govern any given * * * claim." *Agency Holding Corp.*, 107 S. Ct. at 2766. This creates not only the potential for forum shopping[16] and unjustified disparities in the treatment of similar cases, but also the possibility that a transferee court in multidistrict litigation may have to select different limitations periods for each of several consolidated actions involving the identical violation. See, *e.g.*, *In re Clinton Oil Co. Securities Lit.*, [1977-1978]. Fed. Sec. L. Rep. (CCH) ¶ 96,015 at 91,566-567 (D. Kan. 1977). Consequently, in this context, no less than in the civil RICO area, the borrowing of state law " 'virtually guarante[es] . . . complex and expensive litigation over what should be a straightforward matter.' " *Agency Holding Corp.*, 107 S. Ct. at 2766.

(2) If, as we believe, federal law offers a more appropriate source for a Rule 10b-5 limitations period, the next question that arises is which federal statute of limitations supplies the best analogy to the Rule 10b-5 action. Two alternatives suggest themselves. One, endorsed by the Third Circuit in *Data Access*, are the statutes of limitations contained in the Exchange Act applicable to provisions other than Section 10(b). But there is another alternative, namely, the new statute of limitations adopted by Congress in 1988 as part of Section 20A of the Exchange Act. In our view, Section 20A supplies the "closer analogy" (*Agency Holding Corp.*, 107 U.S. at 2764). Congress specifically passed this section to codify a private right of action for certain violations of Rule 10b-5. Application of the Section 20A limitations period would thus promote "[t]he federal policies at stake and the practicalities of litigation." *Agency Holding Corp.*, 107 S. Ct. at 2765.

In amending the securities laws in the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Congress

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[16] The broad venue provisions of Section 27 of the Exchange Act, 15 U.S.C. 78aa, which allow suit to be brought where the violation occurred or where "the defendant is found or is an inhabitant or transacts business," permit a choice of forum.

created an express private right of action on behalf of "contemporaneous" traders against "[a]ny person who violates any provision of this title or the rules or regulations thereunder" by trading while in possession of material, nonpublic information. Pub. L. No. 100-704, § 5, 102 Stat. 4681 (adding Section 20A(a) to the Exchange Act, to be codified at 15 U.S.C. 78t-1(a)). A principal purpose of this provision was "to overturn court cases which [had] precluded recovery for plaintiffs where the defendant's violation is premised upon the misappropriation theory." H.R. Rep. No. 910, 100th Cong., 2d Sess. 26 (1988). The express right of action provided by Section 20A includes a statute of limitations, which states: "No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." Pub. L. No. 100-704, § 5, 102 Stat. 4681 (to be codified at 15 U.S.C. 78t-1(b)(4)).

Section 20A provides, for the first time, a statutory federal limitations period applicable to a private action based on a violation of Rule 10b-5. In passing ITSFEA, Congress legislated against the backdrop of judicial interpretations of Rule 10b-5 and, of course, is presumed to be familiar with that law. See, *e.g., Merrill Lynch Pierce, Fenner & Smith* v. *Curran,* 456 U.S. 353, 382 & n.66 (1982). Indeed, the legislative history manifests an awareness of developments under Rule 10b-5. The House Committee on Energy and Commerce reported that "Section 10(b) of the Exchange Act, along with Rule 10b-5 promulgated by the Commission, has been subject to the most extensive judicial interpretation. Those provisions broadly prohibit fraudulent practices in connection with the purchase or sale of any security, including trading while in possession of material, nonpublic information." H.R. Rep. No. 910, *supra,* at 8. The Committee went on to detail the holdings of this Court's insider trading decisions under the antifraud provisions of the securities laws. *Id.* at 8-10.

With that background in mind, Congress's selection of an appropriate statute of limitations for one type of Rule 10b-5 violation takes on particular significance. By this action, Congress itself " 'established a limitations period attuned to what it

viewed as the proper balance,' " *DelCostello*, 462 U.S. at 171, between, on the one hand, the interest in affording a remedy for investors injured by fraud, and, on the other, the goal of providing repose for companies, market professionals, and other potential defendants in Rule 10b-5 implied actions.[17]

That Congress legislated with respect to only one category of Rule 10b-5 claims does not mean that it intended a different limitations period to apply to other Rule 10b-5 actions. Section 20A(d) provides that "Nothing in this section [creating an express right of action] shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this title or the availability of any cause of action implied from a provision of this title" (to be codified at 15 U.S.C. 78t-1(d)). The legislative history suggests that Congress intended to "avoid * * * freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area," but instead to give "the courts leeway to develop such private rights of action in an expansive fashion in the

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[17] An important component of Section 20A is its ability to guarantee repose at a predictable time. While other statutes of limitations for federal causes of action have been held to be subject to equitable tolling, *Holmberg* v. *Armbrecht*, 327 U.S. at 395-396, we do not believe that equitable tolling would be appropriate under Section 20A. The language of Section 20A(b)(4) itself does not suggest that Congress intended there to be tolling under it, because it computes the timeliness of a claim "from the date of the last *transaction* that is the subject of the violation" (emphasis added). Moreover, the absence of tolling in private securities actions accords with the pattern of the express limitations periods under the Exchange Act. The judicial consensus is that the three year outer limit of the Exchange Act one-and-three year limitations period is an absolute bar and is not subject to equitable tolling. See, *e.g.*, *Zola* v. *Gordon*, 685 F. Supp. 354, 361 (S.D.N.Y. 1988) (citing cases). The legislative history of the Exchange Act confirms that Congress intended these periods to be absolute in order to ensure repose. See H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 32, 36, 42 (1934); 78 Cong. Rec. 8198-8201 (1934). See also *Norris* v. *Wirtz*, 818 F.2d at 1332; *ABA Task Force Report*, *supra*, 41 Bus. Law. at 655 (finding it "inescapable * * * that Congress did not intend equitable tolling to apply in actions under the securities laws."); *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369, 1374-1375 (9th Cir. 1988) (Aldisert, J., concurring). No question of equitable tolling is presented in this case, however, as petitioners brought suit within five years of all transactions alleged as the subject of the violation.

future." H.R. Rep. No. 910, *supra,* at 27. See also 134 Cong. Rec. H7,470 (daily ed. Sept. 13, 1988) (remarks of Rep. Lent); *id.* at S17,220 (daily ed. Oct. 21, 1988) (remarks of Sen. Garn). Thus, Congress in ITSFEA clearly signaled its intent to continue to allow courts to develop the incidents of the law governing implied rights of action such as that recognized under Rule 10b-5, including of course the selection of the most appropriate statute of limitations.

The practicalities of litigation also support application of the Section 20A limitations period to all Rule 10b-5 actions. In many cases there would be no difficulty in distinguishing between an insider trading case and some other type of Rule 10b-5 violation. In other cases, however, the parties could readily recast a claim as either one or the other (indeed, this may be such a case). If one sort of Rule 10b-5 action is governed by Section 20A(d)'s limitations period, while another is limited differently, then parties will have an incentive to engage in "artful pleading" in the hopes of "persuad[ing] the court that the facts and legal theories of a particular * * * claim" fall under whichever period of limitations is longer. *Owens* v. *Okure,* 109 S. Ct. 573, 576 (1989) (criticizing practice under Section 1983 prior to *Wilson* v. *Garcia*). Courts would also be called upon to wrestle with these characterization questions, reducing much of the benefit of having a uniform federal limitations period. This the overburdened judiciary does not need.

(3) The principal competing federal alternative to Section 20A is the one-and-three year limitations period applicable to express causes of action under the Exchange Act.[18] This alter-

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[18] The Exchange Act contains such statutes of limitations for the express rights of action it creates under Sections 9, 18, and 29. Section 9(e), 15 U.S.C. 78i(e), addresses manipulation of security prices. Section 18(c), 15 U.S.C. 78r(c), creates liability for misleading statements in any application, report, or document filed with the Commission. Section 29(b), 15 U.S.C. 78cc(b), permits rescission of certain purchases or sales of a security in violation of the Exchange Act or rules thereunder (and provides a limitations period for certain of those actions). (The limitations period for the latter section was added in 1938, Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076.) The sole exception to

native, which was endorsed by the Third Circuit in *Data Access,* has substantial surface appeal. Indeed, when an implied right of action under Rule 10b-5 was first recognized more than forty years ago, the selection of those limitations periods rather than state law arguably would have been the better solution. See, *e.g.,* L. Loss, *supra,* at 995-996. For several reasons, however, we do not believe that, in the present day, the one-and-three approach represents the best solution.

First, the relatively short Exchange Act statutes of limitations were devised for remedies that, in general, gave plaintiffs certain litigation advantages that they do not enjoy under Rule 10b-5. See, *e.g., Hochfelder,* 425 U.S. at 207-210 (noting that liability for negligence exists under several express causes of action, in contrast to requirement of *scienter* under Section 10(b)); *Huddleston,* 459 U.S. at 384 & n.18 (same).[19] The distinctions between the Rule 10b-5 right of action and the various express actions counsel against mechanically extending their limitations periods to Rule 10b-5. Moreover, because these periods are shorter than most state statutes currently being applied, see *Hochfelder,* 425 U.S. at 210 n.29, and are considerably shorter than Section 20A(d), they would curtail investor protection against fraud, and create significant problems of retroactivity.[20]

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this one-and-three year pattern is Section 16(b), 15 U.S.C. 78p(b), which provides two years for an issuer, or a shareholder suing on its behalf, to recover, on a strict liability theory, "short swing" profits by directors, officers, or beneficial owners of more than 10 percent of a class of securities who purchase and sell their companies' securities within six months. See also Section 13 of the Securities Act of 1933, 15 U.S.C. 77m (providing one-and-three year statute of limitations for action under Sections 11 and 12).

[19] This generalization does not apply to Section 9, 15 U.S.C. 78i, which does require scienter.

[20] Perhaps for these reasons, the American Law Institute's proposed *Federal Securities Code* § 1727(b) (1980), would have provided a statute of limitations of one year from constructive discovery and *five* years from the violation for violations of the antifraud provisions. The *ABA Task Force Report, supra,* 41 Bus. Law. at 658, proposed "a compromise of two years from the date of discovery, with a four-year cutoff," although it believed that having some definite period was more important than the particular period chosen.

There is also a practical drawback, to which we alluded earlier, to selecting the Exchange Act periods for implied Rule 10b-5 claims. At best, those periods would only apply to those Rule 10b-5 claims not expressly covered by the new Section 20A. Application of the one-and-three period for some Rule 10b-5 claims but not others would thereby generate litigation over which limitations period governs a given claim.[21]

Finally, the force of arguments that the one-and-three system provides the best analogy to implied Rule 10b-5 actions has been diminished by the passage of time. It seems odd, fifty-five years after their enactment and forty-three years after recognition of a cause of action under Rule 10b-5, that the Exchange Act limitations periods should be lifted from their statutory context and applied for the first time to the present-day Rule 10b-5 action.[22] Any speculation that the 73d Congress would have intended to apply the one-and-three system to Rule 10b-5 claims founders by virtue of the fact that "there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such [an implied] remedy." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 196. No matter how prescient, the 73d Congress could not possibly have anticipated the growth of Rule 10b-5 once a judicially-implied cause of action came into being. That Rule

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[21] The confusion that would necessarily result could make it more difficult for public issuers to readily "calculate their contingent liabilities," *Agency Holding Corp.*, 107 S. Ct. at 2764, for financial statement purposes, thereby possibly adversely affecting the accuracy of their disclosure. See *ABA Task Force Report, supra*, 41 Bus. Law. at 647.

[22] There is also cause for hesitation in applying the one-and-three year system in the fact that Congress, which is presumed to be aware that courts had not used those limitations periods for Rule 10b-5, has never legislatively "corrected" this situation (except insofar as it did so in enacting Section 20A). Cf. *Huddleston*, 459 U.S. at 385-386 (noting that Congress extensively revised the federal securities laws in 1975, by which time "federal courts had consistently and routinely permitted a plaintiff to proceed under § 10(b) even where express remedies under § 11 or other provisions were available. In light of this well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action.") (footnote omitted). These concerns are far weaker with respect to the application of Congress's recent enactment of a uniform federal limitations period for a category of Rule 10b-5 violations.

now overlaps in significant respects with the coverage of other express causes of action, and carries with it an articulated body of rules that touches all facets of the securities industry. We are unable to divine an adequate textual, historical, or policy justification for this Court to prefer a limitations system enacted by Congress half a century ago, with certain delimited rights of actions in mind, over a limitations period that Congress so recently enacted, with full knowledge of the wide swath cut by Rule 10b-5.

3. We believe that the question of the proper statute of limitations for Rule 10b-5 actions is important, and should be resolved by this Court on an appropriate occasion. If the only issue presented concerned the choice of an appropriate state limitations period, then further review might not be warranted: in those circumstances, the Court could at most impose uniformity in the method for selecting an appropriate state statute, but not uniformity in results, since the States differ widely among themselves in setting limitations periods for both fraud and blue sky violations. However, with a federal limitations period to consider, as one court of appeals, sitting en banc, has endorsed, this Court's review could result in genuine uniformity in all Rule 10b-5 actions. Whether *Data Access* correctly concluded that the usual presumption in favor of borrowing state limitations statutes should be overcome here, and if so which federal statute supplies the most appropriate analogy to Rule 10b-5 actions, are issues that deserve this Court's consideration.

Although we believe that the question is important, this case may not present a suitable vehicle for the Court's review. To be sure, the determination of the proper statute of limitations is purely a question of law, and the facts of this case allow for consideration, in a concrete context, of each of the four leading alternatives. Petitioners urge the application of state blue sky law (see Pet. 5), and could attack the court of appeals' judgment by arguing for application of Section 20A. Respondents prevailed below on the basis of state fraud law, and could support that judgment by arguing for the application of the Exchange Act one-and-three year system. Moreover, the question pre-

sented by the petition (Pet. i) is framed in a sufficiently broad fashion to encompass any of the four alternatives, including our suggestion that the limitations period be drawn from Section 20A.

There are, however, prudential considerations that counsel against immediate review of the issue. Section 20A was enacted on November 19, 1988, 102 Stat. 4680, more than three months after the court of appeals rendered its decision in this case. Tne application of Section 20A, therefore, obviously could not have been addressed below, and petitioners did not urge its application in their certiorari petition. Ordinarily, this Court does not decide new issues in these circumstances. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *United States* v. *Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The fact that no other court of appeals has considered the effect of Section 20A also counsels in favor of restraint. Furthermore, issues of retroactivity are lurking in this case with respect to the application of Section 20A; those also have not been addressed by any court.[23] Finally, because statutes of limitations questions arise with some frequency, there will undoubtedly be occasions for the Court to visit the issue in the future. In consequence, although we believe the issue is an important one meriting the Court's consideration, we do not urge that certiorari be granted at this time.

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[23] We note that ITSFEA provides that "The amendments made by this Act * * * shall not apply to any actions occurring before the date of enactment of this Act." Pub. L. No. 100-704, § 9, 102 Stat. 4684 (to be codified at 15 U.S.C. 78*o* note). That section would not directly apply here, since the application of Section 20A to Rule 10b-5 would be a matter of "interstitial lawmaking," *DelCostello*, 462 U.S. at 172. Nevertheless, the effective date of the Act might be of relevance in determining whether to apply Section 20A to actions occurring before the date of its enactment. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, No. 88-385 (May 15, 1989), slip op. 8 (applying new principle regarding arbitrability of Securities Act claims retroactively).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX*

Circuit	*Theory*	*First Case*	*Most Recent Case*
1st	Personal Injury	*Janigan* v. *Taylor*, 344 F.2d 781 (1965) (applying Massachusetts' two-year statute)	*Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1987); *General Builders Supply Co.* v. *River Hill Coal Venture*, 796 F.2d 8 (1986) (same)
2d	Fraud	*Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (1951) (applying New York's two- and six-year fraud statute)	*Armstrong* v. *McAlpin*, 699 F.2d 79 (1983) (same)
3d	Federal One-and-Three	*In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (en banc), cert. denied, 109 S. Ct. 131 (1988) (applying Exchange Act one-and-three)	*Hill* v. *Equitable Trust Co.*, 851 F.2d 691 (1988) (same, retroactively), cert. denied, 109 S. Ct. 791 (1989)

* Based on the ABA's Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 659-661 (App. A) (1986), as updated to reflect the current state of the law. State limitations periods applied to Rule 10b-5 have been held to be subject to equitable tolling. See *ABA Task Force Report, supra*, 41 Bus. Law. at 654-655.

Circuit	*Theory*	*First Case*	*Most Recent Case*
4th	Blue sky	*Fox* v. *Kane Miller Corp.*, 542 F.2d 915 (1976) (applying Maryland's one-year blue sky statute)	*O'Hara* v. *Kovens*, 625 F.2d 15 (1980), cert. denied, 449 U.S. 1124 (1981) (same)
5th	Blue sky/ fraud	*O'Connell* v. *Economic Research Analysts*, 499 F.2d 994 (1974), cert. denied, 419 U.S. 1122 (1975) (applying Florida's blue sky law); *Azalea Meats, Inc.* v. *Muscat*, 386 F.2d 5 (1967) (applying Florida's three-year fraud statute)	*Jensen* v. *Snellings*, 841 F.2d 600 (1988) (applying Louisiana two-year blue sky statute); *Breen* v. *Centex Corp.*, 695 F.2d 907 (1983) (applying Texas's two-year fraud statute)
6th	Blue sky/ fraud	*Carothers* v. *Rice*, 633 F.2d 7 (1980) (applying Kentucky's three-year blue sky statute), cert. denied, 450 U.S. 998 (1981); *Charney* v. *Thomas*, 372 F.2d 97 (1967) (applying Michigan's six-year fraud period)	*Herm* v. *Stafford*, 663 F.2d 669 (1981) (Kentucky's three-year blue sky period); *Marx* v. *Centran Corp.*, 747 F.2d 1536 (1984) (applying Ohio's four-year fraud period), cert. denied, 471 U.S. 1125 (1985)

Circuit	*Theory*	*First Case*	*Most Recent Case*
7th	Blue sky	*La Rosa Building Corp.* v. *Equitable Life Assurance Society*, 542 F.2d 990 (1976) (applying Indiana two-year statute); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (1972) (applying Illinois's three-year statute)	*Norris* v. *Wirtz*, 818 F.2d 1329 (same, Illinois law), cert. denied, 108 S. Ct. 329 (1987); *Cahill* v. *Ernst & Ernst*, 625 F.2d 151 (1980) (applying Wisconsin one-to-three year statute)
8th	Blue sky	*Vanderboom* v. *Sexton*, 422 F.2d 1233 (1970), cert. denied, 400 U.S. 852 (1970) (applying Arkansas's two-year statute	*Harris* v. *Union Elec. Co.*, 787 F.2d 355, cert. denied, 479 U.S. 823 (1986) (applying Missouri two-year statute)
9th	Fraud	*Fratt* v. *Robinson*, 203 F.2d 627 (1953) (applying Washington's three-year statute)	*Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369 (1988) (applying California three-year statute); *Volk* v. *D.A. Davidson & Co.*, 816 F.2d 1406 (1987) (applying Montana two-year statute)

Circuit	*Theory*	*First Case*	*Most Recent Case*
10th	Fraud	*De Haas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (1971) (applying Colorado's three-year fraud period)	*Loveridge* v. *Dreagoux*, 678 F.2d 870 (1982) (applying Utah's three-year fraud statute)
11th	Blue sky	*Diamond* v. *Lamotte*, 709 F.2d 1419 (1983) applying Georgia's two-year statute	*Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (1986) (same); *Durham* v. *Business Management Ass'n* 847 F.2d 1505 (1988) (applying Alabama two-year statute)
D.C.	Blue sky	*Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411 (1977) (applying D.C. two-year statute)	*Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (1980) (same, but not applied retroactively), cert. denied, 452 U.S. 954 (1981)

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